

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ELDON ROTH

Appeal 2006-3262
Application 10/780,255
Technology Center 1700

Decided: November 30, 2006

Before GARRIS, WARREN, and KRATZ, *Administrative Patent Judges*.
KRATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the Examiner's final rejection of claims 17-21, 23-26, and 28-32, the only claims that remain pending in this application. We have jurisdiction pursuant to 35 U.S.C. § 134.

Claims 17, 23 and 28 are illustrative of the subject matter on appeal and are reproduced below:

17. A method including:

(a) adding an ammonium hydroxide solution to an initial comminuted meat product to produce an intermediate meat product; and

(b) applying mechanical action to the intermediate meat product.

23. A method including:

(a) adding an ammonium hydroxide solution to a comminuted meat product; and

(b) forcing the comminuted meat product through a conduit after adding the ammonium hydroxide solution to the comminuted meat product.

28. A method including:

(a) adding an ammonium hydroxide solution to a ground meat; and

(b) applying mechanical action to the ground meat after adding the ammonium hydroxide solution.

The Examiner relies on the following prior art references as evidence in rejecting the appealed claims:

| | | |
|-------|--------------|---------------|
| Hines | US 3,023,109 | Feb. 27, 1962 |
| Roth | US 5,433,142 | Jul. 18, 1995 |

Claims 17-21, 23-26, and 28-32 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Roth in view of Hines.

OPINION

Upon review of the opposing arguments and evidence advanced by the Examiner in the Answer and Appellant in the Briefs in support of their respective positions, we conclude that the Examiner has not established a *prima facie* case of obviousness for the claimed subject matter.

Accordingly, we will not sustain the Examiner's § 103 rejection for reasons set forth in Appellant's Briefs, as further discussed below.

Under 35 U.S.C. § 103(a), the Examiner carries the initial burden of establishing a *prima facie* case of obviousness. *In re Piasecki*, 745 F.2d 1468, 1471-72, 223 USPQ 785, 787-88 (Fed. Cir. 1984). As part of meeting this initial burden, the Examiner must determine whether the differences between the subject matter of the claims and the prior art “are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art” (emphasis added). 35 U.S.C. § 103(a)(1999); *Graham v. John Deere Co.*, 383 U.S. 1, 14, 148 USPQ 459, 465 (1966). The applied prior art references as a whole must be viewed from the perspective of one of ordinary skill in the art to determine whether “some suggestion” is present to arrive at the claimed subject matter. *Cf. In re Mills*, 470 F.2d 649, 651, 176 USPQ 196, 198 (CCPA 1972).

The Examiner relies on Roth for teaching: (1) contacting ground meat with a working gas under pressure using a reciprocating pump; (2) releasing the pressure; and then (3) transporting the meat to reduce the microbial content and to maintain the color of the meat. The Examiner correctly observes that the reciprocation pump action and subsequent meat transport of Roth results in mechanical action being applied to the meat of Roth (Non-

Final Office Action mailed April 22, 2005 at 2).¹ The Examiner does not rely on Roth for disclosing the addition of an ammonia hydroxide solution to a comminuted meat product, as required by all of the appealed claims.

According to the Examiner, however, “[i]t would have been obvious to use ammonia gas or aqueous ammonia as the working gas in Roth since it is old to contact meat with ammonia or ammonium hydroxide to produce a bright red color in the meat, as evidenced by Hines (Exs. 1 and 2 and claim 1).” *Id.*

The difficulty we have with the Examiner’s obviousness position is twofold.

Firstly, the Examiner has not fairly established that Hines teaches or suggests adding an ammonium hydroxide solution to comminuted meat, as here claimed. As pointed out by Appellants in the Briefs, Hines teaches that fresh red meat should be exposed to an atmosphere containing ammonia to aid in retention of the red meat color (Br. 4 and Reply Br. 1). Hines teaches that aqua ammonia or liquid ammonia hydroxide may be the source of the ammonia used in forming the atmosphere that the meat is contacted with (Hines, col. 1, ll. 55-59, Example 2, and claim 1). The Examiner has not established that Hines discloses or suggests contacting the meat with aqua ammonia or adding an ammonium hydroxide solution to the meat. Indeed, Hines discloses contacting the meat with an atmosphere formed by the liquid ammonium hydroxide (Example 2).

¹ The Examiner refers to this Non-Final Office Action for the statement of the rejection (Answer 3). As an aside, we note that the practice of incorporating a statement of rejection in the Answer by referring to another paper without fully restating the Examiner’s rejection in the Answer is not in accord with current examination practice. *See* MPEP § 1207.02, Eighth Ed., Rev. 3 (Aug., 2005).

Secondly, even if the Examiner had established that Hines would have led one of ordinary skill in the art to contact meat with an aqueous ammonium hydroxide solution as an equivalent process to the ammonia containing atmosphere - meat contact disclosed in Hines, the Examiner has not reasonably explained how Hines together with Roth would have led one of ordinary skill in the art to modify Roth's pressurized gas contact and pressure letdown method to include an aqueous ammonium hydroxide - meat contacting step. The Examiner simply has not explained how an aqueous ammonium hydroxide solution would be employed as a working gas in Roth. After all, the Examiner's expressed position in the Answer is that Hines furnishes motivation to employ ammonia gas in Roth as the working gas thereof (Answer 3). However, the latter proposed modification of Roth would not result in a process corresponding to the claimed process. This is because the claimed process requires a comminuted meat - ammonia hydroxide solution contacting step followed by a mechanical action step, not an ammonia gas-meat contacting step followed by a mechanical action step. The Examiner's commentary in response to arguments set forth in the Brief make this deficiency in the Examiner's stated obviousness position plain (Answer 3-4).

It follows that we do not sustain the Examiner's obviousness rejection on this record.

CONCLUSION

The decision of the Examiner to reject claims 17-21, 23-26, and 28-32 under 35 U.S.C. § 103(a) as being unpatentable over Roth in view of Hines is reversed.

REVERSED

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